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Supreme Court, U.S.
FILED
MAR 24 2004
OFFICE OF THE CLERK

No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LIMITED, D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Writ of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

BRIEF OF THE WORLD SHIPPING COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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March 24, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF OF THE WORLD SHIPPING COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE WORLD SHIPPING COUNCIL

The World Shipping Council ("WSC") is a non-profit association of thirty companies that operate forty-four international shipping lines.[1] WSC's members include the full spectrum of vessel-operating ocean common carriers, offering containerized, roll-on/roll-off, car carrier, and other inter-

[1] In accordance with the Court's Rule 37.6, WSC and its counsel certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than WSC and its members made any monetary contribution to the preparation or submission of this brief.

national cargo transportation services. WSC's members carry more than ninety percent of the United States' imports and exports transported by the international ocean liner shipping industry, an industry that moves just under $500 billion worth of America's foreign commerce each year.[2] Most of this cargo moves in sealed intermodal freight containers.

Approximately twenty-five percent of the containerized cargo moving in United States foreign commerce involves the participation of non-vessel-operating common carriers ("NVOCCs").[3] A significant number of all containers that move into and out of the United States each year are carried under "through" bills of lading of the type at issue in this case. Under a through bill of lading, the vessel operating carrier arranges and undertakes the transportation responsibility for the entire movement of the cargo, including necessary inland legs of the transportation.[4] Vessel operators fulfill the inland transportation component of a through move in the majority of cases by contracting with railroads or trucking companies or both to provide those inland services. Vessel operators also routinely contract for terminal, stevedoring, warehousing, and other logistics and cargo handling services.

Because a substantial amount of the containerized cargo moving into and out of the United States involves the participation of NVOCCs and further involves movement on

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[2] *See* U.S. Army Corps of Engineers U.S Foreign Waterborne Statistics, *Preliminary U.S. Foreign Waterborne Cargo Summary – November 2003* (visited March 18, 2004) <http://www.iwr.usace.army.mil/ndc/usforeign/pcsnov2003.htm>.

[3] *See* Federal Maritime Commission, *The Impact of the Ocean Shipping Reform Act of 1998*, 84 (2001) (discussing NVOCC numbers in context of service contract participation).

[4] An NVOCC might also issue a "through" bill of lading (as happened in this base), but even when the NVOCC issues a through bill, it is virtually always the vessel operator that actually arranges for the inland portion of the through transportation.

through bills of lading, the outcome of this case will have a substantial impact on the ability of vessel operators to structure their relationships with the other transportation providers that ocean carriers employ to provide through transportation. Specifically, unless this Court rejects the Eleventh Circuit's holding that an NVOCC is not the agent of its shipper customer when the NVOCC arranges with a vessel operating carrier to provide through transportation for the shipper's cargo, companies that provide services to vessel operators will not be able to continue to rely on the liability protection that they have today through the Clause Paramount and Himalaya clause provisions of the vessel operators' bills of lading. The inability of terminal operators, stevedores, railroads, and truckers to rely for NVOCC shipments on liability limits authorized by the Carriage of Goods By Sea Act, ch.229, 49 Stat 1207 (1936) ("COGSA"), codified at 46 U.S.C.App. 1300 *et seq.*, and incorporated in the vessel-operating ocean carrier's bill of lading, would leave these U.S. companies exposed to cargo damage claims with no liability limits. In turn, this would cause widespread uncertainty and an unwillingness of domestic vendors to accept international cargoes absent a disruptive, unnecessary, and expensive restructuring of the rate structures and insurance arrangements that currently govern through transportation.

STATEMENT

A. International Intermodal Transportation and the Effect of the Decision of the Court of Appeals.

As is described in some detail in the briefs of *amici* the United States and the Association of American Railroads filed at the petition stage, international ocean transportation of containerized cargo on a "through" or inland-point-to-inland-point basis requires the cooperation of numerous service providers. Sequentially transferring a sealed cargo

container from one mode of transportation to another[5] in order to move it over roads, oceans, and rails in delivering goods from one place to another is simple in concept. However, it is somewhat more complicated in actual operation. Containers of goods do not spontaneously appear at seaports and load themselves onto ships; neither do they unload themselves at the destination port and make their way unaided to their intended recipients. In order for a shipment to make its way from—as in this case—an inland point in Australia to an inland point in the United States, numerous modes of transportation must be employed, and someone must transfer the container from one mode to the next at each stage in its journey.

Depending on the distance from the origination point to the seaport, the cargo might move by truck, rail, or a combination of the two before being loaded on a ship. As each stage in the transportation occurs, the cargo must be physically transferred from one mode to the next, a task that is simplified by containerization. At the seaport the container must be unloaded from its last land conveyance and hoisted aboard ship. At the arrival port, the process is repeated until the cargo is ultimately delivered to the door of the business or individual that is to receive the goods.

Each step in this multi-step process must be scheduled and paid for by someone. Because of the complexities of coordinating all of the inland carriers, terminal operators, and stevedores that must necessarily handle the cargo if it is to get from point A to point Z, shippers, whether they are cargo owners like Kirby or intermediaries like ICC, often request the ocean carrier, which has contacts and relationships in the

[5] It is this aspect of the combination of various modes of transportation such as ocean vessel, rail, and truck that has spawned the terms "intermodal" and "multi-modal" that are used to describe the multi-stage transportation arrangements that are often made for both domestic and international cargoes.

countries on both ends of each of its ocean routes, to arrange for through transportation. Tasking a single entity that has an international presence with the hiring and coordination of the various individual transportation and cargo handling entities that must take possession of the cargo makes possible timely and uninterrupted shipment of thousands of containers daily.

The business and logistics skills of the vessel operator are obviously essential to arranging successful international, intermodal transportation. The other necessary ingredient for maintenance of a successful international transportation system is the ability of the entity coordinating the multiple players in that system—the vessel operator—to be able to manage its risk, including the risk to its contractors. It is to that essential ingredient that this case speaks. The defendant here is a railroad that was hired by the vessel operator, which offered a through bill of lading to an intermediary. If the railroad in this case is not allowed to limit its liability on the grounds that the vessel operator's Himalaya clause does not apply to the transportation provided by the railroad, it takes little imagination to foresee that railroads in the future could decline such shipments, increase rates dramatically, or require substantial indemnifications before accepting cargo from vessel operators in instances where the cargo was tendered to the vessel operator by an NVOCC. The same is true of truckers, stevedores, terminal operators, and other vendors that provide services necessary to complete a through intermodal move. Until *Kirby* was decided by the Eleventh Circuit, these entities understood that their liability was limited by the application to inland activities of the COGSA limits in the bill of lading issued by the vessel operator that hired each of the necessary service providers in the intermodal chain.

Each of the negative effects that would flow from the court of appeals' ruling is contrary to the goals of stability, uniformity, and predictability that COGSA was designed to

provide. That the ruling below is contrary to COGSA is more specifically demonstrated by its relative impacts on vessel operators and NVOCCs. Under that ruling, vessel operators, which are the entities that actually provide the services ("loading, handling, stowage, carriage, custody, care, and discharge") that section 1302 of COGSA makes subject to the statutory duties and protections of COGSA, would not by any act of their own be able to extend liability protection to their contractors if an NVOCC tendered the cargo. This would be so because the rationale of the ruling below is that the shipper is a stranger to the terms and conditions set forth in the vessel operator's bill of lading, notwithstanding that the only way that shipper's cargo will ever reach its destination is through the services provided by that vessel operator. [6] No drafting device by the vessel operator could overcome that rationale. In contrast, NVOCCs under the appeals court ruling can limit liability both for themselves and for any downstream contractors by properly wording their bills of lading. This stands the statute on its head. The party (the vessel operator) that provides the enumerated services that could give rise to the very liability that the statute allows to be limited is cut off from the statute's protection, but a party (the NVOCC) that never touches the cargo and that provides none of the services described by the statute has full access to the law's protection. It is most implausible that such a result was intended by Congress.[7]

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[6] As we discuss in section III of the Argument, this aspect of the Eleventh Circuit's decision contradicts that same court's reasoning in *Polo Ralph Lauren L.P. v. Tropical Shipping & Constr. Co.*, 215 F.3d 1217 (11th Cir. 2000), in which the court held that a company that owned the damaged goods but that was not listed as shipper on the carrier's bill of lading could bring an action under COGSA directly against the carrier because the standard language on the carrier's bill of lading identified the cargo owner as a party to that bill of lading.

[7] COGSA's definition of "carrier" states that the term "includes the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C.App. § 1301. If it were held that the vessel operator's bill of lading was not applicable to bind the shipper whose cargo is on the vessel operator's ship for COGSA purposes (the outcome below), that would mean that the execution of a private contract between an NVOCC and a shipper could by itself oust the "owner or charterer" (i.e., the vessel operator) from COGSA coverage. WSC knows of no ruling of this Court that would allow a federal statute to be vitiated by private contract in this manner.

B. Regulatory Background.

In addition to the factual and practical background described immediately above, there is a regulatory background that is relevant to the issues presented. The Shipping Act of 1984, as amended, 46 U.S.C.App. §§ 1701-1719, regulates the commercial relationships among vessel operators, NVOCCs, freight forwarders, and shippers. The Federal Maritime Commission, the federal agency that implements the Shipping Act, has expressly stated that its authority does not extend to substantive questions under COGSA. In *Definition of "Package" Under the Carriage of Goods by Sea Act*, 23 Shipping Reg. (P&F) 111 (Fed. Maritime Comm'n 1985), the Commission held that it had no authority to promulgate regulations regarding the substance of bills of lading, stating that COGSA is "a separate body of law governing shipowner rights and obligations which is subject only to court interpretation. . . ." *Id.* at 113. Although the Shipping Act and COGSA exist separately, with neither operating directly to affect the terms of the other, the requirements of the Shipping Act are nonetheless relevant to a proper understanding of the roles of vessel operators, NVOCCs, freight forwarders, and shippers.

The Shipping Act differentiates between an "ocean common carrier," which "means a vessel-operating common carrier," and a "non-vessel-operating common carrier" (NVOCC), which "means a common carrier that does not operate the vessels by which the ocean transportation is

provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C.App. § 1702(16) and (17)(B). Because the Shipping Act (which is an antitrust, economic regulation, and anti-discrimination statute) and COGSA do not have overlapping jurisdiction, and the definitions in the Shipping Act are in any event silent on the agency issue before the Court, the Shipping Act does not shed any direct light on that issue. That said, the Shipping Act is relevant because it imposes certain requirements on vessel operators ("ocean common carriers" under the Shipping Act) that govern their relationships with NVOCCs and with the customers of NVOCCs.

The first aspect of the Shipping Act that is relevant here is the concept of common carriage. Both "ocean common carrier[s]" (vessel operators) and NVOCCs fall within the term "common carrier," which the Shipping Act defines in relevant part as "a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation . . . ." 46 U.S.C.App. § 1702(6). Although the traditional scope of common carrier obligations has been curtailed to some extent by amendments to the Shipping Act enacted in 1998,[8] it remains unlawful for any common carrier to "unreasonably refuse to deal or negotiate," 46 U.S.C.App. § 1709(b)(10). Accordingly, common carriers under the Shipping Act are not permitted the same latitude that participants in unregulated industries have to decide not to deal with a potential customer for any reason or no reason at all. *See, e.g., United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (trader or manufacturer may generally "exercise his own independent discretion as to parties with whom he will deal."). Thus, while it might be held in the future to be reasonable for a vessel operator to refuse to deal with an

[8] *See* The Ocean Shipping Reform Act of 1998, P.L. 105-258, 112 Stat. 1902.

NVOCC if to do business with that NVOCC would subject the vessel operator or its contractors to unlimited liability, the understanding for now is that vessel operators are under certain obligations within the bounds of reason to accept cargo from NVOCCs. Accordingly, it is not a realistic answer to the risks imposed by *Kirby* to say simply that a vessel operator may choose not to deal with NVOCCs. In any event, that hardly seems a desirable result, since for vessel operators to cease providing services to NVOCCs would by definition put NVOCCs out of business.

There is an additional Shipping Act requirement that is perhaps more directly relevant to the agency issue before the Court. The Shipping Act provides that:

> Except with regard to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, and paper waste, each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules and practices between all points or ports on its own route and on any through transportation route that has been established. However, common carriers shall not be required to state separately or otherwise reveal in tariffs the inland divisions of a through rate. The tariffs shall—
>
> . . .
>
> (E) *include sample copies of any bill of lading*, contract of affreightment, or other document evidencing the transportation agreement; . . . .

46 U.S.C.App. § 1707(a)(1)(emphasis added). 46 U.S.C.App. § 1707(a)(2), in turn, provides that: "Tariffs shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations, and a reasonable charge may be assessed for such access. No charge may be assessed a Federal agency for such access."

In addition to being required to make their tariffs public and accessible and to include a copy of the bill of lading in the tariff, common carriers under the Shipping Act are required to follow those published tariffs. 46 U.S.C.App. § 1709(b)(2) provides in relevant part that no common carrier may "provide service in the liner trade that—(A) is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of this Act. . . ." The mandatory tariff publication requirements coupled with the requirement to provide service only in accordance with those tariffs means that the filed rate doctrine applies to transportation subject to the Shipping Act. *See, e.g., Stallion Cargo, Inc—Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act*, 29 Shipping Reg. (P&F) 665, 676 and n.24 (Fed. Maritime Comm'n 2001). Under the filed rate doctrine, a term that is required to be published in a tariff (like the bill of lading language required to be published by 46 U.S.C.App. § 1707(a) (1) (E)) has not just the force of contract, but the force of law. *See Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939). Moreover, the public is deemed to have notice of the terms of such tariffs; the shipper need not have knowledge of the terms to be bound. *See, e.g., Maislin Indus. v. Primary Steel*, 497 U.S. 116, 120 (1990) (shipper's ignorance not a defense to collection of filed rate).

SUMMARY OF ARGUMENT

WSC agrees with petitioner Norfolk Southern Railway Company ("Norfolk Southern") and *amici* the United States, the American Association of Railroads ("AAR"), and the P&I Clubs that the Eleventh Circuit erred in ruling that the Himalaya clause in the NVOCC's bill of lading was not sufficiently specific to extend COGSA's liability limitation to Norfolk Southern. The briefs of Norfolk Southern and supporting *amici* thoroughly address that point; WSC therefore does not brief that issue.

With respect to the first issue presented—whether the court of appeals erred in holding that the NVOCC did not act as the agent of the shipper so as to bind the shipper to the terms of the bill of lading issued by the vessel operator—WSC also supports reversal on that point.

By definition, non-vessel-operating common carriers do not own or operate vessels. They are therefore physically incapable of providing the transportation services that they sell to their shipper customers. Instead, NVOCCs buy transportation services from vessel operators and resell those services in turn to their own customers for a profit. The insertion of an NVOCC between the shipper and the vessel operating carrier does nothing to change the fundamental fact that it is the vessel operating carrier (and the inland transportation providers that the vessel operator hires for through transportation), not the NVOCC, that actually transports the cargo. In fact as well as in law, then, the role that the NVOCC plays is that of agent of the shipper for the purpose of obtaining transportation services from a vessel operator. Under this arrangement, the shipper and the vessel operator are the real parties in interest with respect to the contract for transportation that is evidenced by the bill of lading that is issued by the COGSA "carrier," i.e., "the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C.App. § 1301(a). As a party to that contract of carriage with the vessel operator, the shipper is bound by such Clause Paramount and Himalaya clause extensions of COGSA coverage as might appear in the vessel operator's bill of lading.

A central concern of the appeals court with respect to the agency argument appears to have been that the shipper did not have notice of the terms of the vessel operator's bill of lading. The filed rate doctrine's application to the vessel operator's bill of lading—including terms regarding through transportation as required by 46 U.S.C. § 1707(a)(1)—elim-

inates that issue, because the shipper (as well as the rest of the shipping public) is deemed as a matter of law to have knowledge of the terms of the vessel operator's published bill of lading terms, terms that by law must be applied.

In addition to conflicting with cases from other circuits on the issue of the NVOCC's role as the agent of the shipper, the decision below also conflicts with a prior decision of the Eleventh Circuit itself. That case was cited in the petition for rehearing and rehearing en banc filed with the court of appeals, but was not mentioned in the panel's decision. In *Insurance Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934 (11th Cir. 1990), the court recognized, as a necessary predicate to its analysis, that a vessel-operating carrier would treat an NVOCC as the agent of the shipper. *Id.* at 937 n.2. Because the Eleventh Circuit's policy regarding circuit precedent is that a later three-judge panel may not disregard an earlier three-judge panel's decision, *see United States v. Lehder-Rivas*, 827 F.2d 682, 683 (11th Cir. 1987), the *Kirby* panel did not have the authority to overrule *Ocean Lynx*.

Although the issue has not been argued by the parties, the result that the shipper and the vessel operator are bound by the vessel operator's bill of lading in a transaction involving an intermediary NVOCC is also supported by appellate precedent holding that an owner of the goods was a direct party to the vessel operator's bill of lading by virtue of the broad wording of the term "Merchant" in the vessel owner's bill of lading. *See All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427 (9th Cir. 1993). The Eleventh Circuit relied on *All Pacific* in holding that an owner of lost cargo could sue the vessel operator directly as either a party to the bill of lading or as a third party beneficiary of the bill of lading even though the shipper named on the bill of lading was the cargo owner's bailee. *See Polo Ralph Lauren L.P. v. Tropical Shipping & Constr. Co.*, 215 F.3d 1217 (11th Cir. 2000).

ARGUMENT

I. ICC ACTED AS KIRBY'S AGENT FOR THE PURPOSE OF BINDING KIRBY TO HAMBURG SUD'S BILL OF LADING.

The decision below proceeds from an unexplained assumption that an NVOCC that acts as a common carrier[9] cannot also act as the agent of the NVOCC's customer for the purposes of binding that customer to the terms of the bill of lading issued by the vessel operating carrier that actually transports the customer's cargo. In its opposition to the petition for certiorari, Kirby echoed that reasoning, urging that the NVOCC's relationship to the shipper as nominal "carrier" makes the NVOCC a "principal" in relationship with the shipper. Petition in Opposition at 12 ("An entity cannot be a principal and an agent with respect to the same duties owed to the same parties at the same time."). However true the proposition about agents and principals might be as a general statement of law, it does not describe the situation here.

The fact that an NVOCC assumes contractual responsibility to the shipper for the performance of the transportation does not make him a "principal" with respect to all aspects of that transportation so as to preclude his being an agent with respect to other parts. He is a middleman, plain and simple, and both the NVOCC and the customer know from the outset that the NVOCC cannot *physically* provide the transportation that the NVOCC has *contractually* bound itself to procure. The parties thus enter into their agreement with full knowledge that the agreement can only be performed by someone else—the vessel operator and its

[9] Although there is much confusion in the record about whether ICC was acting as a "freight forwarder" or an NVOCC, WSC assumes that ICC was acting as an NVOCC, because there can be no real disagreement that a freight forwarder is an agent.

contractors and subcontractors. Notwithstanding that the NVOCC's contract with the shipper might (as is the case here) state that the NVOCC will procure such transportation "in his own name," J.A. at 86, it procures that transportation for the sole benefit of the shipper, because the NVOCC itself has no interest in the goods or their movement outside of the interest of its customer. To the extent that the NVOCC does not disclose the name of its customer to the vessel operator, that does not make the NVOCC any less of an agent; it simply becomes an agent for an undisclosed principal. That role as agent for an undisclosed principal is entirely consistent with the fact that the NVOCC is liable to the vessel operator for payment of freight and is also responsible to its principal, the shipper, to procure the contracted-for transportation. *See, e.g. Port Ship Serv. v. International Ship Management*, 800 F.2d 1418, 1420-21 (5th Cir. 1986) (agent of partially disclosed principal held liable).

To the extent that respondents rely on the Shipping Act's classification of NVOCCs as "common carriers" (and thus "principals" in relation to their customers), that reliance is unavailing for two reasons. First, NVOCCs are classified by the Shipping Act as "common carriers" in their dealings with their customers so that they can be brought under the Act's consumer protection provisions dealing with non-discrimination, tariff publication, refusals to deal, unreasonable practices, and the like. These concerns have nothing whatever to do with cargo liability concerns addressed by COGSA, as the Federal Maritime Commission has made clear. *See Definition of "Package" Under the Carriage of Goods by Sea Act*, 23 Shipping Reg. (P&F) 111 (Fed. Maritime Comm'n 1985). There, the Commission held that it had no authority to promulgate regulations regarding the substance of bills of lading, stating that COGSA is "a separate body of law governing shipowner rights and obligations which is subject only to court interpretation. . . ." *Id.* at 113.

Second, even though the Shipping Act defines both vessel operators and NVOCCs as "common carriers," the two are not treated the same for all regulatory purposes. For example, vessel operators are granted a limited antitrust immunity to the extent that they act collectively under agreements filed with the agency. 46 U.S.C. § 1703(a) (addressing agreements by or among "ocean common carriers").[10] In addition, the Shipping Act allows vessel operators ("ocean common carriers"), but not NVOCCs, to enter into service contracts as an alternative to setting rates in a tariff. That NVOCCs may not enter into service contracts with their customers[11] is made clear by the Shipping Act's definition of "service contract," which is "a written contract, other than a bill of lading or a receipt, between one or more shippers and an *individual ocean common carrier or an agreement between or among ocean common carriers*. . . ." 46 U.S.C.App. §1702(19) (emphasis added). [12] In sum, although the Shipping Act treats NVOCCs as "carriers," it does not treat them the same as vessel operators.[13] The distinctions are relevant because they

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[10] The Shipping Act defines "ocean common carrier" as "a vessel-operating common carrier." 46 U.S.C.App. § 1702(16).

[11] Because an NVOCC is "a shipper in its relationship with an ocean common carrier," 46 U.S.C.App. § 1702(17)(B), the NVOCC can, as a shipper, enter a service contract with a vessel-operating ocean carrier.

[12] 46 U.S.C.App. § 1709(b)(2) requires that common carriers provide service "in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of this Act. . . ." Nothing in that section or any other provision of the Shipping Act relieves vessel operating common carriers that establish prices and terms under service contracts from the obligation under 46 U.S.C.App. § 1707(a)(1)(E) to publish a tariff that contains a sample copy of the carrier's bill of lading.

[13] Although the Shipping Act definitions and relationships are not designed to affect the application of COGSA, to the extent that one were to seek guidance there, it is of some interest that both freight forwarders and NVOCCs are classified under the general heading of "ocean

act as a reminder that definitions and distinctions in the Shipping Act exist because they further the policies and purposes of that law. Those definitions and distinctions were not intended to and do not inform or affect in any way the proper treatment of NVOCCs under COGSA.

Although the court of appeals couched its decision in terms of agency, the language of the decision suggests that the court was most concerned about notice to the shipper of the terms of the vessel operator's (Hamburg Sud's) bill of lading. *See* Pet. App. 6a (in which the court below concluded that "ICC, not Kirby, hired Hamburg Sud, and ICC, not Kirby, is named on the bill as the shipper of the goods, which means that Kirby did not itself agree to the terms of the bill."). A combination of the fundamental nature of the transactions at issue, coupled with the application of the filed rate doctrine, renders the inescapable result that whether or not Kirby made any affirmative indication that it accepted the Hamburg Sud bill of lading terms, it was bound by them.[14]

Kirby knew full well that ICC would have to procure the services of an ocean carrier, who would in turn have to procure the services of other carriers, terminal operators, and stevedores to get Kirby's cargo from Australia to Alabama. Knowing that ICC relied entirely on other carriers to provide the services that ICC sold to Kirby, Kirby was on actual notice that ICC could sell to Kirby only what ICC was able to buy from Hamburg Sud. These realities of the transaction that ICC and Kirby entered into are sufficient to have imposed a duty on Kirby to inquire as to the terms upon which Hamburg Sud provided the transportation that ICC bought from Hamburg Sud and resold to Kirby. Having apparently failed

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transportation intermediaries," a term that aptly describes their roles as agents. 46 U.S.C. § 1702(17).

[14] Kirby's actual acceptance of the Hamburg Sud bill of lading is discussed in section III, *infra* at note 16.

to make that fundamental inquiry in the course of dispatching a multi-million dollar shipment halfway around the world, and having purchased insurance to cover any risk thus incurred, neither Kirby nor its insurer should now be heard to complain that they lacked knowledge of the terms of the services that ICC bought from Hamburg Sud and resold to Kirby.

Whatever duty to inquire the law might generally impose on a purchaser of resold services, federal statutory law in the field of ocean common carriage has done away with the need to rely on such a duty in order to bind an NVOCC's customer to the bill of lading issued by the vessel operator that actually carries the goods. 46 U.S.C.App. § 1707(a)(1)(E) requires that every common carrier serving the United States foreign trades publish a copy of its bill of lading in a publicly accessible tariff. It is a violation of 49 U.S.C.App. § 1709 (b)(2)(A) to provide ocean or through international transportation service that "is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff. . . ." Put simply, the filed rate doctrine applies to terms that are required to be published in ocean carriers' tariffs, and bill of lading terms are required to be so published. Where the filed rate doctrine applies, the terms published do not just have the force of contract, they have the force of law. *See Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939). Thus, neither actual knowledge nor constructive knowledge of the terms of the published bill of lading is required; those published terms apply by operation of law.

Kirby affirmatively sought to obtain the benefit of the services covered by Hamburg Sud's tariff and was successful in doing so. Having gotten the benefit of its bargain, the filed rate doctrine binds Kirby to the terms of that bargain as published in the tariff of the carrier that moved the cargo, whether or not Kirby knew what those terms were and

whether or not Kirby even knew that they existed. As such, the concerns of the court of appeals regarding knowledge and notice were misplaced. Nothing in the result urged by petitioner prevents ICC and Kirby—as between themselves—from agreeing to a higher liability limitation; what is proscribed is the power that the court of appeals' decision would give to ICC to bargain away the limits that Hamburg Sud had published in its tariff and was bound by law to apply.

II. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH A PRIOR ELEVENTH CIRCUIT DECISION.

For the reasons stated immediately above, the holding of the court of appeals that ICC did not act as Kirby's agent should be reversed. That holding should also be reversed because it directly conflicts with a prior Eleventh Circuit decision. In *Insurance Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934 (11th Cir. 1990), the court stated with respect to a transaction involving an NVOCC that: "Edusystems [the shipper] may treat Mar [the NVOCC] as a common carrier for the purposes of COGSA, but underlying carriers such as Bottacchi [the vessel operator] treat Mar as Edusystems' agent." *Id.* at 937 n.2. The court then went on to apply the terms of the vessel operator's bill of lading in limitation of a claim brought by the cargo owner's subrogee. Because the Eleventh Circuit's policy regarding circuit precedent is that a later three-judge panel may not disregard an earlier three-judge panel's decision, *see United States v. Lehder-Rivas*, 827 F.2d 682, 683 (11th Cir. 1987), the *Kirby* panel did not have the authority to overrule *Ocean Lynx*.

III. KIRBY WAS BOUND BY THE HAMBURG SUD BILL OF LADING AS EITHER A DIRECT PARTY TO OR A THIRD PARTY BENEFICIARY OF THAT BILL OF LADING.

Although the issue has not been briefed by the parties, amicus WSC notes that a holding under which the shipper and the vessel operator are bound by the vessel operator's bill of lading in situations in which there is an intermediary NVOCC is supported by precedent in both the Ninth Circuit and the Eleventh Circuit, independent of the NVOCC's status as an agent. In *All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu, 7 F.3d 1427* (9th Cir. 1993), the court held that an owner of the goods that contracted with an NVOCC for transportation was a direct party to the bill of lading issued by the vessel operator with which the NVOCC contracted. The basis of that holding was the definition of "Merchant" in the vessel operator's bill of lading. "Merchant" was there defined to include "the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading." *Id.* at 1432.[15] Finding that the cargo owner had accepted this

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[15] Both the Hamburg Sud and ICC bills of lading contain definitions of "Merchant" that are functionally indistinguishable from the definition in the bill of lading in *All Pacific*. *See* J.A. at 59, 85. This term is ubiquitous in industry bills of lading. Looking at the transaction from the vessel operator's perspective, it is obvious that the bundle of terms and conditions that the vessel operator sells to the NVOCC includes rights and responsibilities on the part of cargo interests such as the NVOCC's customers. By placing those rights and responsibilities in its bill of lading, which the vessel operator must by law publish as part of its tariff, the vessel operator has done all that it must and all that it can to give notice to the world of those terms. If the NVOCC fails to share with its customer the terms on which the NVOCC has procured carriage for the customer's cargo, or if the customer fails to inquire of the NVOCC about those terms, the implications of those failures should remain between the NVOCC and its customer. The vessel operator's rights, which would be clear absent the participation of the NVOCC, should not be affected.

bill of lading by suing the vessel operator for damage to the owner's cargo,[16] the court held that the plain terms of the bill of lading made the cargo owner a direct party to the vessel operator's bill of lading. *Id.*

The Eleventh Circuit cited *All Pacific* with approval in *Polo Ralph Lauren L.P. v. Tropical Shipping & Construction Co.*, 215 F.3d 1217, 1222 (2000). In *Tropical Shipping*, the court of appeals held that a cargo owner not named on the bill of lading could sue a vessel operator as a direct party to the bill of lading or as a third party beneficiary to the bill of lading. There, the bill of lading made reference to the "shipper, consignee or owner of the goods" as being parties to the contract. *Id.* Thus, even though the entity named as the "shipper" on the bill of lading was a bailee of the cargo owner, and the cargo owner's name appeared nowhere on the bill, the court held that the cargo owner, if it could demonstrate ownership, could sue under the terms of the bill of lading. *Id.* at 1223.

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[16] The court in *All Pacific* noted that COGSA contains no statutory requirement for acceptance of the bill of lading, but stated that state law required acceptance. *Id.* To the extent that acceptance may be required, and the cargo interest has not accepted by suing on the contract, that requirement should be satisfied by the combination of (1) the fact that the shipper tendering cargo knows that the cargo will be delivered to a vessel operator for transport, and (2) the shipper is deemed by law to have knowledge of the vessel operator's bill of lading terms by virtue of the filed rate doctrine and the Shipping Act's requirement that carriers publish a copy of their bill of lading in their tariffs. It would be no answer that Kirby did not know which vessel operator ICC would employ, because that carrier was identified on ICC's bill issued to Kirby. Even if the NVOCC did not advise the shipper of the identity of the underlying carrier, the shipper need only ask the NVOCC for that information. WSC knows of no case in which a court has excused a party from a contractual responsibility based on that party's avoidance of relevant and immediately accessible information about its own transaction. Kirby in fact brought an action against Hamburg Sud in Australia. *See* J.A. at 19-29.

Although both *All Pacific* and *Tropical Shipping* dealt with cases in which the cargo owner, not the vessel operator or its contractor, invoked the bill of lading, there is nothing to suggest that the cases do not apply in both directions. If there is a contract, by definition the parties on both sides of the bargain are bound, and the rationale of the cases has equal validity whether it is a carrier or cargo interest that invokes the contract. In other words, one can choose whether or not to enforce one's rights, but the existence of those rights does not depend on the decision of whether or not to enforce them.

The concept that a cargo owner that is not named as a shipper on a vessel operator's bill of lading may nevertheless be a direct party to or a third party beneficiary of the vessel operator's bill of lading for cargo liability purposes is entirely consistent with the fact that it is during the physical carriage by the vessel operator or its contractor that cargo damage resulting in liability may occur. It is to this relationship between shipper and vessel owner or charterer that COGSA speaks and makes mandatory its limitations on liability. *See* 46 U.S.C.App. § 1302 (making applicable the "rights and immunities" of sections 1303 and 1304 to "the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods"). Moreover, it is settled law that a vessel operator has a lien on the cargo to satisfy unpaid freight. *See The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 554 (1866). That lien exists irrespective of whether the cargo against which the lien was asserted was tendered to the vessel operator directly by the shipper or through an NVOCC. *See, e.g., Johnson Prods. Co. v. M/V La Molinera*, 628 F.Supp. 1240, 1248 (S.D.N.Y. 1986) (vessel operator entitled to lien on cargo without regard to malfeasance of freight forwarder and NVOCC). In either case the law recognizes the relationship between the cargo and the ship, further evidence that the cargo owner is bound as either a direct party to or as a third party beneficiary of the vessel operator's bill of lading. Seen against this background of a

long recognized relationship between the cargo owner and the vessel operator that is unaffected by the insertion of an NVOCC, recognition that the cargo owner is bound by the vessel operator's bill of lading for COGSA purposes is no more than application of an established rule.

CONCLUSION

Both because ICC's bill of lading was sufficiently explicit to extend COGSA's liability limits to Norfolk Southern and also because ICC acted as Kirby's agent for the purpose of binding Kirby to Hamburg Sud's bill of lading, the court of appeals' decision should be reversed.

Respectfully submitted,

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March 24, 2004